TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1950

No. 217

ORVILLE COLLINS, H. D. BURKHEIMER, STANLEY LORD, ET AL., PETITIONERS

vs.

HUGH HARDYMAN, MRS. EMERSON MORSE, MRS. TOSCA CUMMINGS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED JULY 24, 1950.

CERTIORARI GRANTED OCTOBER 9, 1950.

No. 12120

United States
Court of Appeals
for the Ninth Circuit

HUGH HARDYMAN, MRS. EMERSON MORSE, MRS. TOSCA CUMMINGS and MRS. MABLE L. PRICE,

Appellants,

vs.

ORVILLE COLLINS, H. D. BURKHEIMER, STANLEY LORD, JAMES E. DOGGETT and RALPH BAKER,

Appellees.

Transcript of Record

Appeal from the United States District Court
for the Southern District of California
Central Division

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS

For Appellants:

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For Appellees Collins, Lord, Doggett and Baker:

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* Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States in and for the Southern District of California, Central Division

No. 8004-Y

HUGH HARDYMAN, MRS. EMERSON MORSE, MRS. TOSCA CUMMINGS, and MRS. MABEL L. PRICE,

Plaintiffs.

vs.

ORVILLE COLLINS, H. C. BURKHEIMER, STANLEY LORD, JAMES E. DOGGETT, RALPH BAKER, and JOHN DOE I to XXV,

Defendants.

AMENDED COMPLAINT FOR DAMAGES UNDER FEDERAL CIVIL RIGHTS ACT

I.

The plaintiffs and each of them are citizens of the United States and residents of the County of Los Angeles and within this judicial district; at all times herein, the plaintiffs have been and are members of the Crescenta-Canada Democratic Club, the plaintiff Hugh Hardyman being Chairman of the Program and Publicity Committee of said club, the plaintiff Mrs. Emerson Morse being Chairman of said club, and the plaintiff Mrs. Tosca Cummings being former Secretary thereof.

Said Crescenta-Canada Democratic Club is a voluntary association, being a political club, and is an official club duly organized and chartered by the Los Angeles County Democratic Central Com-

mittee and as such is an officially recognized club of the Democratic Party; said club was organized and exists for the [2] purpose of participating in the election of officers of the United States, including the President of the United States, the Vice-President of the United States, and members of the Congress of the United States, (including Representatives in the House of Representatives of the United States and in the Senate of the United States); and said club was further organized and exists to petition the national government for redress of grievances and to engage in public meetings for the discussion of national public issues by its members, as citizens of the United States, including the external and international policies of the United States.

II.

The defendants are residents of the County of Los Angeles and within this judicial district. John Doe I to XXV are residents of the County of Los Angeles and within this judicial district; at all times set forth herein they participated in, and cooperated in, carrying out, the unlawful conspiracy entered into and carried out by the hereinabove named defendants, as will appear more particularly hereinbelow.

When the true names of said defendants are known to the plaintiffs, they will ask leave of court to amend their complaint and insert said true names.

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III.

Pursuant to the purpose of the Crescenta-Canada Democratic Club aforesaid, said club has held public meetings in the City of La Crescenta from time to time; and said club scheduled and arranged for a regular public meeting in the City of La Crescenta under the auspices of said club for the evening of November 14, 1947; said public meeting was scheduled to be addressed by David Leff, a former official of the United Nations Relief and Rehabilitation Administration, to speak on the external policy of the United States, his subject being: "The Cominform and the Marshall Plan." At said public meeting said subject aforesaid [3] was scheduled for public discussion by those attending said meeting; and was additionally scheduled to be the subject of a resolution to be hereinafter set forth.

Prior to said meeting, said club had the practice and custom of adopting resolutions on national issues at its regular public meetings aforesaid; and said custom and practice included forwarding said resolutions to appropriate officers of the United States.

With respect to the foreign policy of the United States, and specifically with respect to the Marshall Plan, as a specific phase of said United States foreign policy, said club had, prior to said November 14, 1947, adopted the policy of opposing said Marshall Plan; and pursuant to said policy, said club had from time to time, adopted resolutions criticizing said Plan, and had petitioned the Gov-

ernment of the United States for a redress of grievances with respect to said Plan by forwarding said resolutions to the President of the United States, the State Department, and members of the Congress of the United States.

With further reference to said public meeting scheduled for said November 14, 1947, said club, through its officers, intended to present a resolution for adoption at said meeting opposing said Marshall Plan, pursuant to the policy aforesaid of said club; and said club, through its officers, further intended and planned to forward said resolution, by way of a petition for a redress of grievances, to the President of the United States, to the State Department of the United States and to the members of the Congress of the United States.

IV.

Prior to said November 14, 1947, the defendants and each of them knew of the proposed and scheduled meeting aforesaid and the purposes of said meeting, as aforesaid.

A few days prior to said November 14, 1947, and on a [4] date to the plaintiffs unknown, said date being peculiarly within the exclusive knowledge of the defendants, the defendants made and entered into an unlawful conspiracy, and they did conspire to deprive the plaintiffs as well as the members of said Crescenta-Canada Democratic Club, as citizens of the United States, of privileges and immunities, as citizens of the United States, of the rights peaceably to assemble for the purpose of discussing and

communicating upon national public issues, namely, the external and international policies of the United States, and to petition the national government for a redress of grievances pertaining to said external and international policy of the United States, as aforesaid.

Said defendants further unlawfully conspired to deprive the plaintiffs as well as the members of said club, as citizens of the United States, of equal privileges and immunities under the laws of the United States, as aforesaid, in that, to the knowledge of said defendants, many public meetings had been scheduled and held in the County of Los Angeles prior to said November 14, 1947, and resolutions were adopted thereat, which said public meetings were scheduled and held, and which resolutions had been adopted, by groups and organizations, with whose opinions on international issues said defendants agreed. With respect to the meetings of said groups and the adoption by them of resolutions, aforesaid, the defendants knowingly did not interfere with said meetings and said resolutions, or conspire so to do. With respect to the meeting aforesaid on November 14, 1947, however, the defendants conspired to interfere with said meeting for the reason that the defendants opposed the views of the plaintiffs, and the views of said club, and of its members upon the external policy of the United States; and the defendants conspired, as aforesaid, to interfere with the adoption and transmission of a resolution by said club upon said subject; as aforesaid, for the reason that said defend-

ants opposed the views to be set forth in said resolution. [5]

Said defendants further conspired to go in disguise upon the highways of the City of La Crescenta and upon the premises of said meeting-place in said City of La Crescenta, said disguise consisting of the unlawful and unauthorized wearing of caps of the American Legion.

V.

Pursuant to the conspiracy aforesaid and to carry out its purposes and its terms and solely for said purposes, the defendants and each of them did disguise themselves by the unlawful and unauthorized wearing of caps of the American Legion and did proceed on the highways of the City of La Crescenta in said disguise and did proceed to the premises of said meeting in said City of La Crescenta in said disguise; and, upon arriving at the premises of said public meeting in said City of La Crescenta aforesaid, by threats of force and by the use of force, did assault and intimidate the plaintiffs and those present at said meeting; and the defendant H. C. Burkheimer did push and shove the plaintiff Hugh Hardyman; and the defendants did order the plaintiffs and all persons present at said meeting to break up said meeting and to leave the premises of said meeting-place, against the will and consent of the plaintiffs and those present at said meeting; and the defendants did thus prevent, in addition, the adoption and transmission of the resolution, scheduled to be adopted at said meeting

upon the Marshall Plan, as aforesaid; and the defendants thus did interfere with the right of the plaintiffs to petition the Government for a redress of grievances pertaining to said Marshall Plan, as aforesaid.

VI.

This court has jurisdiction under the provisions of 28 U.S. Code Section 41 (12) and 8 U.S. Code Section 47 (3); and 28 U.S. Code Section 41 (1), in that the cause of action herein arises under the Constitution of the United States and under statutes of the United States, to wit: 8 U.S. Code Section 47 (3) [6] and 28 U.S. Code Section 41 (12) and the controversy herein exceeds, exclusive of interest and cost, the sum of Three Thousand ($3,000.00) Dollars.

VII.

As a result of the foregoing acts of the defendants and each of them, the plaintiffs were intimidated, feared serious bodily harm, and suffered humiliation, indignity and nervous shock, and were deprived of their constitutional rights as set forth hereinabove each, to their damage, in the sum of Five Thousand ($5,000.00) Dollars. The defendants and each of them acted wantonly, maliciously, and arbitrarily by virtue whereof the plaintiffs and each of them are entitled to punitive damages in the sum of Twenty Thousand ($20,000.00) Dollars.

Wherefore, the plaintiffs pray for judgment in favor of each plaintiff and against each defendant as follows:

The sum of Five Thousand ($5,000.00) Dollars as actual damages;

The sum of Twenty Thousand ($20,000.00) Dollars as punitive damages;

For cost of suit herein;

For such other relief as to the court is proper.

LOREN MILLER,
EDMUND COOKE,
MORTIMER VOGEL,
THELMA HERZIG,
WILLIAM B. ESTERMAN,
JANE GRODZINS,
A. L. WIRIN,
By /s/ A. L. WIRIN,
Attorneys for Plaintiffs.

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed Jul 1, 1948. [7]

[Title of District Court and Cause]

MOTION AND NOTICE OF MOTION TO DISMISS AMENDED COMPLAINT

To: Plaintiffs, Hugh Hardyman, Mrs. Emerson Morse, Mrs. Tosca Cummings, and Mrs. Mabel L. Price, and to their attorneys, Loren Miller, Edmund Cooke, Mortimer Vogel, Thelma Herzig, William B. Esterman, Jane Grodzins and A. L. Wirin:

You and Each of You will please take notice that on September 20, 1948, at 10:00 a. m. or as soon thereafter as counsel can be heard, defendant, H. C. Burkheimer, will move that the above-cap-

troned matter be dismissed on the ground that the complaint fails to state a cause of action within the jurisdiction of this Court.

Dated this 20th day of July, 1948.

/s/ AUBREY N. IRWIN,
Attorney for Defendant, H. C. Burkheimer. [9]

POINTS AND AUTHORITIES

I.

The Complaint Fails to State a Cause of Action Within the Purview of 8 USCA 47 (3) the Controlling Statute.

The extent of the plaintiffs' rights in this case are defined and circumscribed by 8 USCA 47 (3).

"Rights and immunities created by or dependent upon the constitution of the United States can be protected by Congress. The form and the manner of protection may be such as Congress, in the legitimate exercise of its legislative discretion, shall provide."

United States vs. Rewes, 92 U. S. 214.

8 USCA 47 (3) is a statute very limited in scope. It deals with two categories of conspiracies by individuals:

(1) A conspiracy wherein the conspirators contemplate going in disguise to deprive an individual of rights protected by the Fourteenth amendment to the Constitution; (2) A conspiracy directly to interfere with the campaign for and election of federal officeholders.

The statute goes no further, and the statement of facts alleged in the complaint does not state a cause of action within the scope of that statute.

(a) The Court can take judicial notice of the fact that one is not disguised when he wears an American Legionnaire's cap.

> "Disguise: A dress or exterior put on to conceal or deceive . . ." "To change the guise or appearance of especially to conceal by an unusual dress." [10]
>
> 27 Corpus Juris Secondum 146

(b) There are no facts alleged which show that the defendants interfered with the support or advocacy by the plaintiffs in favor of the election of any federal officeholder.

II.

8 USCA 47 (3) Was Not Intended to Apply to Such Matters as the Case at Bar.

"Until 1875, save for the limited jurisdiction conferred by the Civil Rights Acts, infra, federal courts had no original jurisdiction of actions or suits merely because the matter in controversy arose under the Constitution or laws of the United States; and the jurisdiction then and since conferred upon the United States has been narrowly limited."

Hague vs. C.I.O., 307 U.S. 496, 507

"The statutes which appellant seeks to invoke were passed shortly after the Civil War to aid in

the enforcement of the Thirteenth Amendment abolishing slavery, the Fourteenth Amendment prohibiting State action, the effect of which would be to abridge the privileges or immunities of citizens of the United States or to deprive any person of life, liberty or property without the due process of law or to deny any person the equal protection of the law, and the Fifteenth Amendment prohibiting the denial of the right to vote on account of race or color. See Buchanan vs. Warley, 245 U. S. 60, 78, 38 S. Ct. 16, 62, L. E. 149; L.R.A. 1918 C, 210, Ann. Cas. 1918 A., 1201. The statutes were intended to provide for redress against State action and primarily that which discriminated against individuals within the jurisdiction of U. S. Hague vs. C.I.O., 307 U. S. 496, 509-514, 595 S. Ct. 954, 83 L. Ed. 1473; Hodges vs. U. S. 203 U. S. 1, 14-20, 27 S. Ct. 6, 51 L. Ed. 65; Logan vs. U. S., 144 U. S. 263, 290, [11] 291, 12 S. Ct. 617, 36 L. Ed. 429. The statutes, while they granted protection to persons from conspiracies to deprive them of the rights secured by the Constitution and laws of the United States (U.S. vs. Mosley, 238 U. S. 383, 387, 388, 35 S. Ct. 904, 59 L. Ed. 1355) did not have the effect of taking into federal control the protection of private rights against invasion by individuals (citing cases). The protection of such rights and redress of such wrongs was left with the States."

Love vs. Chandler, 124 F 2d 785

III.

The Plaintiffs' Complaint Fails to State Facts Showing That a Federally Protected Right Was Invaded.

The plaintiffs apparently have attempted to state a cause of action which would conform to the dictum in United States vs. Cruickshank, 92 U. S. 542, 552 to the effect that the right of people to assemble and discuss issues of national importance and to petition for a redress of grievances is a right which is an attribute peculiar to national citizenship, as contrasted with those rights which are regarded as inherent in all free men. If such be the intention of the plaintiffs, their complaint does nothing more than allege an interference with their right peaceably to assemble, not a right of national citizenship according to the Cruickshank case.

See Generally:

Allen vs. Corsano, 56 Fed. Supp. 169

Hodges vs. U. S., 203 U. S. 1

Logan vs. U. S., 144 U. S. 263

(Acknowledgment of Service.)

[Endorsed]: Filed July 20, 1948. [12]

[Title of District Court and Cause]

MOTION AND NOTICE OF MOTION TO DISMISS AMENDED COMPLAINT

To: Plaintiffs Hugh Hardyman, Mrs. Emerson Morse, Mrs. Tosca Cummings, and Mrs. Mabel L. Price and to their attorneys, Loren Miller, Edmund Cooke, Mortimer Vogel, Thelma Herzig, William B. Esterman, Jane Grodzins and A. L. Wirin:

You and Each of You will please take notice that on September 20, 1948, at 10:00 a. m. or as soon thereafter as counsel can be heard, defendants Orville Collins, Stanley Lord, James E. Doggett and Ralph Baker will move that the above-captioned matter be dismissed on the ground that the complaint fails to state a cause of action within the jurisdiction of this Court.

GEORGE PENNEY,
ROBERT M. NEWELL,
THEODORE A. CHESTER,
By /s/ ROBERT M. NEWELL,
Attorneys for Defendants. [14]

POINTS AND AUTHORITIES

I.

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"The statutes which appellant seeks to invoke were passed shortly after the Civil War to aid in the enforcement of the Thirteenth Amendment abolishing slavery, the Fourteenth Amendment prohibiting State action, the effect of which would be to abridge the privileges or immunities of citizens of the United States or to deprive any person of life, liberty or property without the due process of law or to deny any person the equal protection of the law, and the Fifteenth Amendment prohibiting the denial of the right to vote on account of race or color. See Buchanan vs. Warley, 245 U. S. 60, 78, 38 S. Ct. 16, 62, L. E. 149; L.R.A. 1918 C, 210, Avn. Cas. 1918 A., 1201. The statutes were intended to provide for redress against State action and primarily that which discriminated against individuals within the jurisdiction of U.S. Hague vs. C.I.O., 307 U. S. 496, 509-514, 595 Ct. 954, 83 L. Ed.

1473; Hodges vs. U. S. 203 U. S. 1, 14-20, 27 S. Ct. 6, 51 L. Ed. 65; Logan vs. U. S., 144 U. S. 263, 290, [16] 291, 12 S. Ct. 617, 36 L. Ed. 429. The statutes, while they granted protection to persons from conspiracies to deprive them of the rights secured by the Constitution and laws of the United States (U.S. vs. Mosley, 238 U. S. 383, 387, 388, 35 S. Ct. 904, 59 L. Ed. 1355) did not have the effect of taking into federal control the protection of private rights against invasion by individuals (citing cases). The protection of such rights and redress of such wrongs was left with the States."

Love vs. Chandler, 124 F 2d 785.

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See Generally:

Allen vs. Corsano, 56 Fed. Supp. 169.

Hodges vs. U. S., 203 U.S. 1

Logan vs. U. S., 144 U.S. 263

(Affidavit of Service by Mail Attached.)

[Endorsed]: Filed July 28, 1948. [17]

[Title of District Court and Cause]

OPINION

Appearances:

Loren Miller, Edmund Cooke, Mortimer Vogel, Thelma Herzig, William B. Esterman, Jane Grodzins, A. L. Wirin, Attorneys for Plaintiffs, Los Angeles, California. George Penney, Robert M. Newell, Attorneys for Defendants, Los Angeles, California. [19]

Yankwich, District Judge:

I.

THE CIVIL RIGHTS STATUTE AND ITS IMPLICATIONS

The action is instituted under the first clause of Subdivision (3) of Section 47 of Title 8 U.S.C.A., which reads:

"If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of de-

priving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more [20] persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators."

The object of this enactment is to give to persons injured as the result of the three types of conspiracies it designates, a claim for damages against the participants.

The section is implemented by Subdivision 1 of Section 1343 of Title 28 U.S.C.A., in effect September 1, 1948, which is a re-codification of Section 41

(12) of the old Title 28 U.S.C.A., which, in turn, reads:

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 47 of Title 8."

It is beyond dispute that the Government of the United States may exercise, within the limits of its sovereignty, [21] and upon the soil which is a part of the United States, its powers and functions. (1)

From this flows the power of the Congress of the United States to secure, through criminal or civil sanctions, the protection of the rights which the Constitution guarantees to individuals. The scope of such legislation and the type of the rights to the protection of which it may be directed, is well stated in In re Quarles and Butler (2):

"The United States are a nation, whose powers of government, legislative, executive and judicial, within the sphere of action confided to it by the Constitution, are supreme and paramount. Every right, created by, arising under, or dependent upon the Constitution, may be protected and enforced by such means and in such manner as Congress, in the exercise of the correlative duty of protection, or of the legislative powers conferred upon it by the Constitution, may in its discretion deem most

eligible and best adapted to attain the object. United States vs. Logan, 144 U.S. 293.

"Section 5508 of the Revised Statutes provides for the punishment of conspiracies 'to injure, oppress, threaten or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or [22] laws of the United States, or because of his having so exercised the same.'

"Among the rights and privileges, which have been recognized by this court to be secured to citizens of the United States by the Constitution, are the right to petition Congress for a redress of grievances; United States v. Cruickshank, 92 U.S. 542, 553; and the right to vote for presidential electors or members of Congress; Ex. parte Yarbrough, 110 U.S. 651; and the right of every judicial or executive officer, or other person engaged in the service, or kept in the custody, of the United States, in the course of the administration of justice, to be protected from lawless violence. There is a peace of the United States, In re Neagle, 135 U.S. 1, 69; United States v. Logan, above cited."

II.

NATIONAL OR STATE RIGHTS

We thus find recognition of the following as rights, privileges and immunities stemming from the Constitution of the United States: The right of assembly and to petition the Congress for redress of grievances; (3) the right to discuss national legislation or national affairs (4); the right to vote for presidential electors and members of the Con-

gress (5); the right to protection of person, while in the custody of an [23] officer of the United States (6); the right to engage in a profession such as the practice of law before federal courts (7); the right to move from state to state (8).

At the same time, invasions of purely personal rights, the protection of which is within the domain of state power, does not come under the protective shield of general national sovereignty or of statutes such as the Civil Rights Statute, a portion of which is under consideration here. (9) The following rights are in this category: protection against violence when not in the custody of a federal officer (10); the right of employment (11); the right to exercise freedom of the press (12); the right to testify before a grand jury (13); the right to employment by public bodies (14). The case last referred to contains a very succinct summary of the holdings we have just epitomized:

"The statutes which the appellant seeks to invoke were passed shortly after the Civil War to aid in the enforcement of the Thirteenth Amendment abolishing slavery, the Fourteenth Amendment prohibiting State action the effect of which would be to abridge the privileges or immunities of citizens of the United States or to deprive any person of life, liberty or property without due process or to deny any person the equal protection of the law, and the Fifteenth Amendment prohibiting the denial of the right to vote on account of race or color. See Buchanan v. Warley, 245 U.S. 60, 78, [24] 38 S. Ct. 16, 62 L. Ed. 149, L.R.A.

1918C, Ann. Cas. 1918A, 1201. The statutes were intended to provide for redress against State action and primarily that which discriminated against individuals within the jurisdiction of the United States. Hague v. Committee for Industrial Organization, 307 U.S. 496, 509-514, 59 S. Ct. 954, 83 L. Ed. 1423; Hodges v. United States, 203 U.S. 1, 14-20; 27 S. Ct. 6, 51 L. Ed. 65; Logan v. United States, 144 U.S. 263, 290, 12 S. Ct. 617, 36 L. Ed. 429. The statutes, while they granted protection to persons from conspiracies to deprive them of the rights secured by the Constitution and laws of the United States (United States v. Mosley, 238 U.S. 383, 35 S. Ct. 904, 59 L. Ed. 1355), did not have the effect of taking into federal control the protection of private rights against invasion by individuals. Hodges v. United States, 203 U.S. 1, 14-20, 27 S. Ct. 6, 51 L. Ed. 65; Logan v. United States, 144 U.S. 263, 282-293; 12 S. Ct. 617, 36 L. Ed. 429. The protection of such rights and redress for such wrongs was left with the States." (Emphasis added.)

Inherent in the problem before us is the view that, as a rule, civil rights

> "cannot be impaired by the wrongful acts of individuals, unsupported by State authority in the shape of laws, customs or judicial or [25] proceedings." (15)

This is not to say that the Congress may not, in the exercise of its constitutional power, give a right of action against individuals who conspire to interfere with the exercise of purely national rights.

We postulate that it may, and so stated at the hearing. But, in considering whether it did so in the particular instance, the language of the statute must be considered in the light of these rulings. It is to be noted that, while Section 1343 of Title 28, U.S.C.A. (the jurisdictional section) speaks of "deprivation of any right or privilege of a citizen of the United States," the section creating the substantive rights (16) is narrower. It makes the right of action stem from conspiracy aiming to deprive a person "of the equal protection of the laws, or of equal privileges and immunities under the law." (Emphasis added.)

The qualifying word "equal" presupposes State action. For, as said by the Supreme Court in the Civil Rights cases (17):

"The wrongful act of an individual, unsupported by any such authority, is simply a private wrong, or a crime of that individual; an invasion of the rights of the injured party, it is true, whether they affect his person, his property, or his reputation; but if not sanctioned in some way by the State, or not done under State authority, his rights remain in full force, and may presumably be vindicated by resort to the laws of the State for redress. An [26] individual cannot deprive a man of his right to vote, to hold property, to buy and sell, to sue in the courts, or to be a witness or a juror; he may, by force or fraud, interfere with the enjoyment of the right in a particular case; he may commit an assault against the person, or commit murder, or

use ruffian violence at the polls, or slander the good name of a fellow citizen; but, unless protected in these wrongful acts by some shield of State law or State authority, he cannot destroy or injure the right; he will only render himself amenable to satisfaction or punishment; and amenable therefor to the laws of the State where the wrongful acts are committed. Hence, in all those cases where the Constitution seeks to protect the rights of the citizen against discriminative and unjust laws of the State by prohibiting such laws, it is not individual offences, but abrogation and denial of rights, which it denounces, and for which it clothes the Congress with power to provide a remedy. This abrogation and denial of rights, for which the State alone were or could be responsible, was the great seminal and fundamental wrong which was intended to be remedied. And the remedy to be provided must necessarily be predicated upon that wrong. It must assume that in the cases provided for, the evil or wrong actually committed rests upon [27] some State law or State authority for its excuse and perpetration."

Otherwise said, only the State, or those acting or assuming to act in its behalf, can interfere with the equal protection of law or be guilty of acts amounting to a denial of equal privileges by discriminating against an individual or group. When it does so, it breeds inequality. But when an individual interferes with the rights of another, we are in the domain of private right.

And, unless the act denounced is in aid of State action, which results in deprivation of equality, the wrong is a private wrong,—assault, battery, trespass, or the like,—and not within the statute.

This conclusion is reinforced by the fact that "equal protection of the laws" implies guarantee by the State, not by individuals, acting in dissociation from state power. (18)

Illustrative are the recent restrictive covenant cases. The Supreme Court, while denying judicial aid to their enforcement, does not question their validity as contracts between individuals. (19) This serves to emphasize the fact that, while in the realm of civil rights, the recent decisions of the Supreme Court have inaugurated what two recent historians of constitutional law have called "a new era in civil liberties" (20), the change of approach has meant chiefly the staying of the hand of official arbitrariness or refusal to grant judicial sanction to agreements grounded on inequality. But the same court has hesitated to create a new tort liability even in favor of the government, in the absence of direct congressional [28] authorization. (21)

III.

THE PLEADINGS IN SUMMARY

We now consider the motion to dismiss the amended complaint on file. The basis for the motion is that the amended complaint does not state a claim under Section 47(3) of Title 8 U.S.C.A., or show that a federally protected right was invaded.

In summary, the allegations of the amended Complaint are these:

Plaintiffs are members of the Crescenta-Canada Democratic Club in Los Angeles County, Plaintiff Hardyman being the Chairman of the Program and Publicity Committee, Plaintiff Morse, chairman of the Club and Plaintiff Cummings former secretary. The Club is a political club organized by the Los Angeles County Democratic Central Committee and is an officially recognized club of the Democratic Party.

Among its purposes are participation in the election of the Officers of the United States, including the President, Vice President, and Members of the Congress. It has, as other objects, the petitioning of the national government for redress of grievances and holding public meetings for the discussion of national issues by the members as citizens of the United States.

The defendants also reside in the same County and in our judicial district.

The Club held public meetings from time to time and [29] a public meeting was scheduled in the City of La Crescenta for the evening of November 14, 1947, which was to be addressed by David Leff, a former official of the UNRRA. He was to speak on the external policy of the United States, under the title of "The Cominform and the Marshall Plan." Public discussion was to follow, and it was proposed that the topic would be the subject of a resolution. Prior to the scheduled meeting on November 14th, the Club had adopted a policy of opposition to the Marshall Plan, and had, from time

to time, adopted resolutions criticizing the plan and petitioned

> "The Government of the United States for a redress of grievances with respect of said Plan by forwarding said resolutions to the President of the United States, the State Department, and members of the Congress of the United States."

It was intended to present a resolution of similar import at the scheduled meeting. The defendants, prior to the date, and knowing of the proposed meeting, entered into a conspiracy to deprive the plaintiffs and the members of the Crescenta-Canada Democratic Club

> "as citizens of the United States, of privileges and immunities, as citizens of the United States, of the rights peaceably to assemble for the purpose of discussing and communicating upon national public issues, namely, the external and international policies of the United States, [30] * * * Defendants further unlawfully conspired to deprive the plaintiffs as well as the members of said club, as citizens of the United States, of equal privileges and immunities under the laws of the United States, * * * in that, to the knowledge of said defendants, many public meetings had been scheduled, and held in the County of Los Angeles prior to said November 14, 1947, and resolutions were adopted thereat, which * * * public meetings were scheduled and held, and which resolutions had been adopted, by groups and

organizations, with whose opinions on international issues * * * defendants agreed."

While the defendants had not interfered with the prior meetings and resolutions, the amended Complaint states that they conspired specifically with regard to the meeting of November 14, 1947, because they were opposed to the views of the plaintiffs and of the club and its members. So the object of the conspiracy was to interfere with the adoption

> "and transmission of a resolution by (the) club upon (the) subject, * * * for the reason that (the) defendants opposed the views to be set forth in (the) resolution."

In addition to the conspiracy just mentioned, the amended Complaint states that the defendants also conspired [31]

> "to go in disguise upon the highways of the City of La Crescenta and upon the premises of (the) meeting place in said City of La Crescenta, (the) disguise consisting of the unlawful and unauthorized wearing of caps of the American Legion."

So disguised, the defendants proceeded on the highways of La Crescenta to the premises where the meeting was held. Arriving there, they assaulted and intimidated the plaintiffs and those present at the meeting. The defendant Berkheimer pushed and shoved the plaintiff Hardyman. All the defendants ordered the plaintiffs and all persons present at the meeting to break up the meeting and to leave the premises against the wills of the plain-

tiffs and of those present at the meeting. By such action, they prevented, in addition, the adoption and transmission of the resolution and interferred with the rights of the plaintiffs to petition the Government for a redress of grievances pertaining to the Marshall Plan.

Damages by reason of intimidation, fear of bodily harm, humiliation and indignity are sought in the sum of $5000.00. And, because, it is averred, the actions of the defendants were wanton, malicious and arbitrary, punitive damages in the amount of $20,000.00 are asked.

IV.

NO DISGUISE

Before gauging these allegations by the principles discussed in the first portion of this opinion, we dismiss [32] from consideration the allegation of disguise. The clause of the section (22) dealing with disguise uses the word in its ordinary sense in which the contemporaneous organization at which it was directed,—the Ku Klux Klan—acted, that is, concealment of identity by masks and vestments which covered the entire or part of a person's body to such an extent as to make identification impossible.

The verb "disguise" is defined as follows:

"(1) To change the style of dress of; formerly to dress (oneself) in outlandish, unfamiliar or fantastic fashion; now, to change the customary dress or appearance of; so as to conceal one's identity or counterfeit another's; as, to disguise oneself as

a servant; the costume disguised her. * * * (3) To hide or obscure the true nature or character of, by altering appearances or distinguishing quality: to conceal by misrepresentation or counterfeiting; to cloak, mask, as, to disguise anger, one's sentiments, the taste of quinine." (23)

The noun "disguise" means:

"* * * (2) Unfamiliar or characteristic style of dress or apparel assumed to conceal one's identity; as a king in disguise. Hence that which is used to conceal one's identity or counterfeit another's; specif., a player's or masker's costume, etc; as grotesque disguises at a masquerade. (3) Any outward form, which, intentionally or not, misrepresents [33] the true nature or identity of a person; or thing; a deceptive appearance; as blessings in disguise; also pretense or pretentious appearance; artifice or insincerity, esp. in manners, speech, etc., as, to throw off all disguise; hence any misleading lack of correspondence between appearance and reality; deception; speciousness. 'Without fear or evil or disguise'" (24)

Historically, the meaning has remained unchanged since the 16th Century. (25) This is also the legal meaning of the word. (26)

The wearing of the caps of the American Legion, whether authorized or unauthorized,—which is the only form of disguise charged—does not constitute disguise.

So the sufficiency of the amended Complaint must be determined under the conspiracy clause of the section involved.

V.

VIOLATION OF NATIONAL RIGHT?

The conspiracy clause is unrelated to disguise, it being an alternative to it.

We again advert to the fact that in the cases which have interpreted the civil rights statute, in its various forms, from which this section derives (28), and in which recognition was given to certain rights as national in scope, either under the equal protection (29) or privileges or immunities (30) [34] clauses,—both of which are protected by the Fourteenth Amendment,—the deprivation or infringement of which the courts took cognizance were those of persons acting or claiming to act in official capacities as agents of public bodies,—states or state agencies or arms,—or individuals acting in concert with or in aid of agents or representatives of such public bodies. (31) We find them to be election officials (32) or other interfering with the right of suffrage of negroes (33), or a state guard (34) the mayor and other municipal officers of a city (35), the prosecuting attorney and the judge of a state court (36). No cases exist where an action either civil or criminal has been maintained against private persons who interfered with such rights. And, while the cases intimate that actions might be maintained if the allegations of a complaint showed the specific violation of a right, the cases in which the intimation was made were clearly race discrimination cases where the object was to prevent the exercise of civil rights

by persons of the negro race for whose benefit the Fourteenth Amendment to the Constitution was passed. (37) Granted that the rights secured by the Constitution, unlike those secured by the 14th and 15th amendement, are immune "against the action of individuals as well as of the States" (38), we are not concerned here with an attempt to secure from Governmental bodies as such or individuals acting or pretending to act under the protection of such bodies, obedience to constitutional command. What we must decide is whether a special remedy created by a special statute applies to individuals acting as such and preventing, not by authority real or [35] arrogated, but by threats and physical violence a meeting, the object of which was to discuss a national problem, and, at the conclusion of it, to submit for adoption a resolution relating to the foreign policy of the United States for forwarding to the State Department and others connected with the national government.

The amended Complaint does not allege that it was the aim of the conspiracy to prevent the plaintiffs from holding any meeting. On the contrary, it is stated that a prior meeting by the same group, at which similar resolutions were adopted, was not interfered with, although its objects were known to the defendants.

So we have, at most, a sporadic incident, consisting of a series of acts by which persons of certain political opinions, unrelated to race, are interfered with on the private property of an individual

by acts which, taking the statement of the amended Complaint at its full value, amount to and are punishable under the state laws as disturbances of the peace (39), assault (40), trespass (41), and are actionable as such.

VI.

NO REPOSITORY OF STATE POWER

Two conditions must concur before liability under the civil rights statute attaches: (1) There must be a violation of a national right, and (2) such violation must be by the State, one of its agencies, or persons, being or claiming to be, repositories of state power.

The acts complained of here, in their ultimate effect, are of the character which the Court in Love v. Chandler held [36] outside the purview of this statute. While the court there was dealing with the right of employment by the United States, the language used applies with great force to the situation here because it stresses the inapplicability of the statute to acts by individuals of the type here involved, and the fact that redress for violation of such rights must be sought under the state law. We quote:

"The appellant does not seek redress because the State of Minnesota is discriminating against him, or because its laws fail to afford him equal protection. We have already held that he had no absolute right under the laws of the United States to have or retain employment by the Works Progress Administration. The appellant seeks damages be-

cause certain persons, as individuals, have allegedly conspired to injure him and have injured him by individual and concerted action. The wrongs allegedly suffered by the appellant are assault and battery, false imprisonment, and interference with his efforts to obtain and retain employment with the Works Progress Administration. The protection of the rights allegedly infringed, and redress of the alleged wrongs are, we think within the exclusive province of the State. Compare Hodges v. United States, 203 U.S. 1, 27 S. Ct. 6, 51 L. Ed. 65; Carter v. Greenhow, 114 U.S. 317, 330, 5 S. Ct. 928, 29 L. Ed. 202, 207" (43). [37]

Implicit in these rulings is the fact that the chief aim of all the civil rights legislation is to implement the guarantee of equality of the Fourteenth Amendment. And there runs through the decisions the idea that what might be denial of such guarantee by the State or its agencies would not necessarily be a foundation for actionable liability when done by individuals. The Supreme Court has made this clear in the race restriction cases to which allusion has already been made. In Shelley v. Kraemer (45), the Court says:

"Since the decision of this Court in the Civil Rights Cases, 109 U.S. 3 (1883), the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may

fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful. We conclude, therefore, that the restrictive agreements standing alone cannot be regarded as violative of any rights guaranteed to petitioners by the Fourteenth Amendment. So long as the purposes of those agreements are effectuated by voluntary adherence to their terms, it would appear clear that there has been no action by the State and the provisions of the Amendment have not been violated. Cf. Corrigan v. Buckley, supra." (Emphasis added.)

In the companion case (46), a similar interpretation is placed on the statute (47) which guarantees to all citizens [38] equal rights in the ownership and enjoyment of real property:

"We may start with the proposition that the statute does not invalidate private restrictive agreements so long as the purposes of those agreements are achieved by the parties through voluntary adherence to the terms. The action toward which the provisions of the statute under consideration is directed is governmental action. Such was the holding Corrigan v. Buckley, supra." (48)

Back of these rulings is the historical fact that the equality which the Fourteenth Amendment sought to establish called for protection against discrimination by state action. As said by the Court:

"The historical context in which the Fourteenth Amendment became a part of the Constitution

should not be forgotten. Whatever else the framers sought to achieve, it is clear that the matter of primary concern was the establishment of equality in the enjoyment of basic civil and political rights and the preservation of those rights from discriminatory action on the part of the States based on considerations of race or color. Seventy-five years ago this Court announced that the provisions of the Amendment are to be construed with this fundamental purpose in mind." (49) [39]

VII.

NO ACTION BY REPOSITORIES OF STATE POWER

These declarations have a special meaning and should have great weight in the solution of the problem which confronts us in this case. For they appear in cases which interpret a statute which antedates the adoption of the Fourteenth Amendment and by which the federal government placed its entire power behind a policy guaranteeing equality in the ownership, enjoyment and disposition of real property to all persons having national citizenship. And the Courts, in giving effect to the letter and spirit behind the policy, nullified state action both in the several states and in the District of Columbia contrary to its terms by insisting that the judicial arm should not aid persons entering into agreements violating the policy of the law. Yet, at the same time, the court declared unequivocally that the contracts which lay back

of the state action, i.e., the contracts for the enforcement of which judicial aid was sought,—were legal as between the parties themselves.

These two apparently antipodal conclusions can be harmonized only on the assumption that statutes seeking to carry into effect constitutional provisions directed against discrimination and denial of equality are, in the main, directed at those, who through exercise or abuse of official power, can make these guarantees nugatory. Rightly. For, while a person may, by his action toward another, deprive him of the enjoyment of a right, only persons exercising official power can, by their action, deprive the person of equal rights. For the essence of the constitutional [40] guarantees on that subject, as of other constitutional guarantees, is the assertion of rights against sovereign power and the limitation of sovereign power in the realm of those rights. The race restriction decisions which we are discussing are the most recent illustrations of this approach. For, if the broad contention of the plaintiffs were to prevail, and if it were laid down as an axiom that the infringement of any right guaranteed by federal statute or inherent in national citizenship on the basis of race or otherwise, by individuals conspiring to that end, comes within the purview of Subdivision 3 or Section 43 of Title 8, U.S.C.A., as a denial of equal protection of the laws or of equal privileges and immunities under the law, persons denied equality in the ownership, enjoyment or disposition of property

could seek redress by way of damages against the parties to such covenants. Such a construction would fly in the teeth of the declarations just referred to. For it is inconceivable that the Supreme Court would have declared, in so many words, these contracts to be valid between the parties agreeing to restrict the ownership of property within a district to certain groups, if it had intended to leave open the signatories of such contracts to actions for damages, under this statute, by any of the excluded persons. For a right of action depends on the concurrence of wrong and damage. And a loss arising from acts or conditions which do not create ground for legal distress is damnum absque injuria. (50) The Supreme Court must be assumed to have had these maxims in view when they declared the agreements between the parties, although unenforceable with the aid of the State. [41]

Of course, when speaking of a "wrong," we are excluding ethical considerations. We refer to wrongs in the legal sense only,—that is, wrongs cognizable in law and which may be the object of redress through the judicial process.

VIII.

CONCLUSION

In a complex world, legislative action may invade realms heretofore thought immune from interference, if the legislative body sees social harm in what may have theretofore been considered right

practice legally, morally, and socially. But, in applying a specific statutory enactment of the type under discussion here, we are not free to disregard the line of demarcation laid down by the courts between governmental action and actions by individuals, and adopt a construction which might turn every base manifestation of local prejudice, bigotry or discrimination, into a federal law suit.

We grant that the acts complained of, the occurrence of which is admitted by the motion to dismiss, inflicted a grievous wrong on the plaintiffs. Such acts are manifestations of that ignoble mob spirit which is so abhorrent to a free, decent and democratic society. They undermine due process and play into the hands of those who would destroy constitutional freedom. For they would substitute for freedom and order in society the momentary whim of an aroused and unruly group. They would substitute for a nation united, a nation divided into Spartans and helots. They would enthrone the mob as arbiter [42] of freedom. And I know of no more unsafe and unworthy repository of the rights of the individual. "Mob rule does not become due process of law," (44) by parading under the cloak of fidei defensor.

Notwithstanding this, acts of the character here involved are not a foundation for the legal liability sought to be invoked in this case.

It follows that the Complaint does not state a claim cognizable in this court.

The Motion to Dismiss will, therefore, be granted.

Dated this 4th day of October, 1948.

/s/ LEON R. YANKWICH,
Judge. [43]

NOTES TO TEXT

1. Ex parte Siebold, 1879, 100 U. S. 371, 394-395; In re Neagle, 1889, 135 U. S. 1, 68-69; Logan v. United States, 1892, 144 U. S. 263, 294-295.

In re Quarles & Butler, 1895, 158 U. S. 532, 535.

3. United States v. Cruikshank, 1875, 92 U. S. 542; In re Quarles & Butler, 1895, 158 U. S. 532, 535; Powe v. United States, 1940, 5 Cir., 109 F(2) 147.

4. Hague v. C.I.O., 1939, 307 U. S. 496.

5. Ex parte Yarbrough, 1884, 110 U. S. 651.

6. In re Neagle, 1889, 135 U. S. 169; In re Quarles & Butler, 1895, 158 U. S. 532, 535.

7. Green v. Elbert, 1894, 8 Cir., 63 Fed. 308; Mitchell v. Greenough, 1938, 9 Cir., 100 F(2) 184.

8. Twining v. New Jersey, 1908, 211 U. S. 79, 97; Crandall v. Nevada, 1867, 6 Wall. 35, 47; United States v. Wheeler, 1920, 254 U. S. 281, 299; and see, the concurring opinion of Mr. Justice Douglas in Edwards v. California, 1941, 314 U. S. 177, et seq.

9. 8 U.S.C.A. 47.

10. United States v. Harris, 1882, 106 U. S. 629.

11. Hodges v. United States, 1906, 203 U. S. 1.

12. Powe v. United States, 1940, 5 Cir., 109 F(2) 147.

13. United States v. Sanges, C. C. Ga., 1891 48 Fed. 78. [44]

14. Love v. Chandler, 1942, 8 Cir., 124 F(2) 785.

15. Civil Rights Cases, 1883, 109 U. S. 3, 17; and see, United States v. Harris, 1882, 106 U. S. 629, 643, where the Court uses this language:

"A private person cannot make constitutions or laws, nor can he with authority construe them, nor can he administer or execute them. The only way, therefore, in which one private person can deprive another of the equal protection of the laws is by the commission of some offence against the laws which protect the rights of persons, as by theft, burglary, arson, libel, assault or murder.

16. 8 U.S.C.A., Sec. 47(3).

17. Civil Rights Cases, 1883, 109 U. S. 1, 17-18.

18. They condemn, as does the Fourteenth Amendment, all use or abuse of power by "every person, whether natural or judicial, who is the repository of state power." Home Tel. & Tel. Co. v. Los Angeles, 1913, 227 U. S. 278, 286. And see, Hodges v. United States, 1906, 203 U. S. 1, 14; Truax v. Raich, 1915, 239 U. S. 33; Meyer v. Nebraska, 1923, 262 U. S. 390; West Virginia State Board of Education v. Barnette, 1943, 319 U. S. 624; Screws v. United States, 1945, 325 U. S. 91; Mendez v. Westminster School District, 1946, D. C.

Cal., 64 Fed. Sup. 544, per McCormick, J.; Westminster School District v. Mendez, 1947, 9 Cir., 161 Fed. (2) 774. [45]

19. Shelley v. Kraemer, 1948, 334 U. S. 1, 8-23; Hurd v. Hodge, 1948, 334 U. S. 24, 31. I advert to the fact that many years ago (in 1928), I declined, as a State Judge, to recognize such private agreements as covenants running with the land, and denied injunctive relief to enforce them, only to be overruled by the higher courts of California. See, Littlejohn v. Henderson, 1931, 111 Cal. App. 115. Which serves to emphasize the fact that a trial judge cannot "innovate at pleasure." (Cardoza; The Nature of the Judicial Process, p. 141.) Nor can he follow minority opinions. See my observations in re Lindsay-Stratmore Irr. District, 1937, D. C. Calif. 21 Fed. Sup. 129, 135; and in United States v. Standard Oil Co. et al, Supplemental Opinion, filed June 28, 1948.

Restrictive race covenants are a part of what a great foreign student of American institutions has called "The American Dilemma." See, Gunnar Myrdall, The American Dilemma, 1944. On the historical phase of the whole problem, see Leon Whipple, The History of Civil Liberties in the United States, 1928, pp. 169-209: Osmond K. Fraenkel, Our Civil Liberties, 1944, pp. 189-197. Mr. Fraenkel, who has been a leading exponent of civil liberties, both in thought and action, sums up the law on the cases arising under the privileges and immunities clause in this manner: [46]

"The constitutionality of such laws (laws which

would punish all persons participating in unlawful acts such as lynching) has been questioned since they punish not only state officials but private individuals as well, and the Supreme Court has repeatedly ruled that all the provisions of the Fourteenth Amendment guarantee protection against state action alone. Private wrongdoing may be punished by the states, not as a rule by the federal government." (Emphasis added)

20. Alfred H. Kelly and Winfred A. Harbison, The American Constitution, Its Origins and Development, 1938, pp. 790 et seq.

21. United States v. Standard Oil Co., 1947, 332 U. S. 301; The Circuit Court opinion is Standard Oil Co. v. United States, 1946, 9 Cir., 153 F(2) 958. And see my opinion in the same case, United States v. Standard Oil Co., 1945, D. C. Cal., 60 Fed. Sup. 807.

22. 28 U.S.C.A. 47(3).

23. Webster's Unabridged Dictionary, 1937, Edition, page 747, Col. 3.

24. Webster's Unabridged Dictionary, 1937 Edition, page 747, Col. 3.

25. See Shorter Oxford English Dictionary, 1933, Vol. I, p. 526.

26. Words and Phrases, Vol. 12, p. 695; 27 C.J.S., pp. 146-147.

27. 8 U.S.C.A. 47(3).

28. See cases cited in Notes 1-15. [47]

29. Constitution of the United States, Amendments V and XIV, Sec. 1.

30. Constitution of the United States, Art. IV, Sec. 2. Cl. 1.

31. In re Quarles & Butler, 1895, 158 U. S. 532; United States v. Sanges, 1891, D. C. Ga., 48 Fed. 78.

32. Ex parte Siebold, 1879, 100 U. S. 371; See also United States v. Classic, 1941, 313 U. S. 299, 315; Smith v. Allwright, 1944, 321 U. S. 649.

33. Ex parte Yarbrough, 1884, 110 U. S. 651.

34. Logan v. United States, 1892, 144 U. S. 263.

35. Hague v. C.I.O., 1939, 307 U. S. 496.

36. Mitchell v. Greenough, 1938, 9 Cir., 110 F(2) 184.

37. See cases cited in Notes 33, 34, 35, 36. And see, Allen v. Corsano, 1944, D. C. Del., 56 Fed. Sup. 169.

38. United States v. Classic, 1941, 313 U. S. 299, 315; and see Clyatt v. United States, 1905, 197 U. S. 207, 218.

39. Cal. Penal Code, Section 415 (disturbance of the peace of neighborhood or person); Section 403 (disturbance of public meetings).

40. Cal. Penal Code, Section 602(j) (illegal entry for the purpose of injuring property or property rights or interfering or obstructing lawful business of another).

41. Cal. Penal Code, Sections 240-241 (assault); sections 242-243 (battery). Among the corresponding civil sections relating to civil remedies are California Civil Code, Section 43 (guarantee against personal bodily harm or restraint); California Political Code, Section 51 [48] (defined as

citizens all persons born or residing within the state); California Code of Civil Procedure, Section 338(3) (action for trespass to real property may be brought within three years); section 340(3) (action for assault and battery may be brought within one year). And for the state civil rights provisions see California Civil Code, Sections 51-54.

42. Love v. Chandler, 1942, 8 Cir., 124 F(2) 785.

43. Love v. Chandler, 1942, 8 Cir., 124 F(2) 785, 787.

44. The phrase is that of Mr. Justice Holmes in his dissent, concurred in by Mr. Justice Hughes, in Frank v. Mangum, 1915, 237 U. S. 309, 347.

45. 334 U. S. 1, 13. It is revealing that as authorities for the statement underscored the court refers to United States v. Harris, 1883, 106 U. S. 629, and United States v. Cruikshank, 1876, 92 U. S. 542. So that there is no warrant for the contention that the language of these cases justifies a broad interpretation of the civil rights statutes which would make it a shield against all kinds of private wrongs which interfere with civil rights. (See Milton R. Konvitz, The Constitution and Civil Rights, 1947, pp. 97 et seq.)

46. Hurd v. Hodge, 1948, 334 U. S. 24.

47. 8 U.S.C.A., Sec. 42.

48. Hurd v. Hodge, supra, at p. 31.

49. Shelley v. Kraemer, supra, at p. 23.

50. Yankwich, Handbook on California Pleading and Procedure, 1926, Sec. 161.

[Endorsed]: Filed Oct. 4, 1948. [49]

[Title of District Court and Cause.]

ORDER ON MOTION TO DISMISS

The Motion of the Defendant, filed on July 20, 1948, to dismiss the amended Complaint, filed on July 1, 1948, heretofore heard, argued and submitted, is now decided as follows:

Upon the grounds stated in the Opinion filed this day, the said Motion to Dismiss is granted and the said amended Complaint is hereby dismissed.

Dated this 4th day of October, 1948.

/s/ LEON R. YANKWICH,
Judge.

Judgment entered Oct. 4, 1948. Docketed Oct. 4, 1948. Book 53, Page 364.

[Endorsed]: Filed Oct. 4, 1948. [50]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that plaintiffs Hugh Hardyman, Mrs. Emerson Morse, Mrs. Tosca Cummings, and Mrs. Mabel L. Price, plaintiffs above named, hereby appeal to the Circuit Court of Appeals for the Ninth Circuit from the Orders granting the Defendants' Motion to Dismiss and Dismissing the Amended Complaint entered in this action on October 4, 1948.

LOREN MILLER,
EDMUND COOKE,
MORTIMER VOGEL,
THELMA HERZIG,
WILLIAM B. ESTERMAN,
JANE GRODZINS,
A. L. WIRIN,
By /s/ FRED OKRAND,
Attorneys for Plaintiffs.

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed Oct. 13, 1948. [51]

In the District Court of the United States, Southern District of California, Central Division.

No. 8004-Y

HUGH HARDYMAN, MRS. EMERSON MORSE, MRS. TOSCA CUMMINGS, and MRS. MABEL L. PRICE,

Plaintiffs,

vs.

ORVILLE COLLINS, H. C. BURKHEIMER, STANLEY LORD, JAMES DOGGETT, RALPH BAKER, et al,

Defendants.

JUDGMENT DISMISSING ACTION ON MOTION OF DEFENDANTS

The motion of the above-named defendants for judgment of this court dismissing the above-entitled action, came on regularly to be heard this 20th day of September, 1948, Loren Miller, Edmund Cooke, Mortimer Vogel, Thelma Herzig, William B. Esterman, Jane Grodzins and A. L. Wirin, appearing on behalf of the plaintiffs, and George Penney, Robert M. Newell, Theodore A. Chester and Aubrey N. Irwin, appearing on behalf of the defendants, and after hearing the arguments of counsel and the Court being fully advised in the premises, and the case having been submitted;

And it appearing to the court that the action is instituted under the first clause of the Civil Rights Statute, and it further appearing to the court that the facts set forth in the amended com-

plain do not state a cause of action under the [53] Civil Rights Statute;

It, Is Therefore Adjudged and Decreed that the above-entitled action be and the same is hereby dismissed with prejudice.

Done this 28th day of October, 1948.

/s/ LEON R. YANKWICH,
Judge.

Approved as to form under Rule.

/s/ A. L. WIRIN

Judgment entered Oct. 29, 1948. Docketed Oct. 29, 1948. Book 53, Page 595.

[Endorsed]: Filed Oct. 28, 1948. [54]

[Title of District Court and Cause.]

AMENDED NOTICE OF APPEAL

Notice is hereby given that plaintiffs Hugh Hardyman, Mrs. Emerson Morse, Mrs. Tosea Cummings, and Mrs. Mabel L. Price, plaintiffs above named, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the Orders granting the Defendants' Motion to Dismiss and Dismissing the Amended Complaint entered in this action on October 4, 1948 and from the Judgment entered on October 29, 1948.

LOREN MILLER.
EDMUND COOKE,
MORTIMER VOGEL,
THELMA HERZIG,
WILLIAM B. ESTERMAN,
JANE GRODZINS,
A. L. WIRIN,
By /s/ FRED OKRAND,
Attorneys for Plaintiffs.

(Affidavit of Service by Mail attached.)
[Endorsed]: Filed Nov. 3, 1948. [55]

[Title of District Court and Cause.]

STIPULATION RE RECORD ON APPEAL AND PRAECIPE

Pursuant to Rule 75(f), Federal Rules of Civil Procedure, the parties in the above entitled action hereby stipulate that the following be the Record on Appeal and the Clerk of the above entitled Court is requested to prepare and certify same to the Court of Appeals for the Ninth Circuit:

1. Amended Complaint for Damages under Federal Civil Rights Act;
2. Motion and Notice of Motion to Dismiss Amended Complaint—filed on behalf of defendants Collins, Lord, Doggett, and Baker;
3. Motion and Notice of Motion to Dismiss—filed on behalf of defendant Burkheimer;
4. Order on Motion to Dismiss—dated [57] October 4, 1948;
5. Opinion of Hon. Leon R. Yankwich—filed October 4, 1948;
6. Notice of Appeal;
7. Judgment Dismissing Action on Motion of Defendants—entered October 29, 1948;
8. Amended Notice of Appeal;
9. This Stipulation and Praecipe.

LOREN MILLER,
EDMUND COOKE,
MORTIMER VOGEL,
THELMA HERZIG,
WILLIAM B. ESTERMAN,
JANE GRODZINS,
A. L. WIRIN,
By /s/ FRED OKRAND,
Attorneys for Plaintiffs.

GEORGE PENNEY,
ROBERT M. NEWELL,
THEODORE A. CHESTER,
By /s/ ROBERT M. NEWELL,
Attorneys for Defendants Collins, Lord, Doggett, Baker.

/s/ AUBREY N. IRWIN,
Attorney for Burkheimer.

[Endorsed]: Filed Dec. 3, 1948. [58]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 58, inclusive, contain full, true and correct copies of Amended Complaint for Damages Under Federal Civil Rights Act; Motion and Notice of Motion to Dismiss Amended Complaint of Defendant H. C. Burkheimer; Motion and Notice of Motion to Dismiss Amended Complaint of Defendants Orville Collins et al; Opinion; Order on Motion to Dismiss; Notice of Appeal; Judgment Dismissing Action on Motion of Defendants; Amended Notice of Appeal and Stipulation re Record on Appeal and Praecipe which constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to $15.20 which sum has been paid to me by appellants.

Witness my hand and the seal of said District Court this 9th day of December, A. D. 1948.

(Seal) EDMUND L. SMITH,
Clerk.

[Endorsed]: No. 12120. United States Court of Appeals for the Ninth Circuit. Hugh Hardyman, Mrs. Emerson Morse, Mrs. Tosca Cummings and Mrs. Mable L. Price, Appellants, vs. Orville Collins, H. D. Burkheimer, Stanley Lord, James E. Doggett and Ralph Baker, Appellees. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed December 10, 1948.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
For the Ninth Circuit.

No. 12120

HUGH HARDYMAN, et al,

Appellants,

vs.

ORVILLE COLLINS,

Appellees.

STATEMENT OF POINTS ON APPEAL, AND DESIGNATION OF RECORD STATEMENT OF POINTS

1. The District Court erred in granting defendants' Motions to Dismiss the Amended Complaint;

2. The District Court erred in granting the Judgment dismissing the action on motion of defendants;

3. The District Court erred in holding that 8 U.S.C. 47(3) does not apply to individuals but applies only to action by state officials or those acting under color of state authority and that consequently the Amended Complaint stated no claim cognizable in that Court.

DESIGNATION OF RECORD FOR PRINTING

Appellants hereby designate for printing the entire record as certified to this court by the Clerk of the District Court.

LOREN MILLER,
EDMUND COOKE,
MORTIMER VOGEL,
THELMA HERZIG,
WILLIAM B. ESTERMAN,
JANE GRODZINS,
A. L. WIRIN,
FRED OKRAND,
By /s/ FRED OKRAND,
Attorneys for Appellants.

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed December 22, 1948.

No. 12120

United States
Court of Appeals
For the Ninth Circuit

HUGH HARDYMAN, MRS. EMERSON MORSE, MRS. TOSCA CUMMINGS and MRS. MABLE L. PRICE,

Appellants,

vs.

ORVILLE COLLINS, H. D. BURKHEIMER, STANLEY LORD, JAMES E. DOGGETT and RALPH BAKER,

Appellees.

**Appeal from the United States District Court,
Southern District of California,
Central Division.**

**Proceedings Had in the United States Court of Appeals
for the Ninth Circuit**

United States Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Wednesday, January 18, 1950.

Before: Healy, McAllister and Orr,
Circuit Judges.

[Title of Cause.]

ORDER OF SUBMISSION

Ordered appeal herein argued by Mr. A. L. Wirin, counsel for appellants, and by Mr. Loren Miller, for amicus curiae, National Association for the Advancement of Colored People, and by Mr. Robert Newell, counsel for appellees, and submitted to the court for consideration and decision.

United States Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Monday, May 29, 1950.

Before: Healy, McAllister and Orr,
Circuit Judges.

[Title of Cause.]

ORDER DIRECTING FILING OF OPINIONS AND FILING AND RECORDING OF JUDGMENT

Ordered that the typewritten opinion and dissenting opinion this day rendered by this Court in above cause be forthwith filed by the clerk, and that a judgment be filed and recorded in the minutes of this court in accordance with the majority opinion rendered.

In the United States Court of Appeals
for the Ninth Circuit

No. 12,120

HUGH HARDYMAN, MRS. EMERSON MORSE, MRS. TOSCA CUMMINGS and MRS. MABLE L. PRICE,

Appellants,

vs.

ORVILLE COLLINS, H. D. BURKHEIMER, STANLEY LORD, JAMES E. DOGGETT and RALPH BAKER,

Appellees.

Appeal from the United States District Court for the Southern District of California, Central Division

May 29, 1950

Before: Healy, McAllister,* and Orr, Circuit Judges.

Orr, Circuit Judge:

OPINION AND DISSENTING OPINION

Opinion

The trial court entered a judgment of dismissal of an amended complaint on the ground that it did not state a cause of action for damages under §

*Sixth Circuit, sitting by special designation.

47(3) of Title 8, U.S.C.A.[1] The correctness of that ruling is the subject of this appeal. The amended complaint, in substance, alleged that appellants are citizens of the United States and are members of the Crescenta-Canada Democratic Club. Appellant Morse is chairman of the club and appellant Hardyman is chairman of the program and publicity committee.

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[1] 8 U.S.C.A. § 47(3):

"Depriving persons of rights or privileges.

"(3) If two or more persons in any state or territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any state or territory from giving or securing to all persons within such state or territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators."

The Crescenta-Canada Democratic Club, hereinafter called the club, is a voluntary association, duly organized and chartered by the Los Angeles County Democratic Central Committee and recognized officially as a Democratic club. Its claimed purposes were to participate in the election of officials of the United States, including the President, Vice-President and members of Congress; to petition the National Government for redress of grievances; to engage in public meetings for the discussion of national public issues, including the international and foreign policies of the United States.

Pursuant to a customary practice the club held regular public meetings in the City of La Crescenta at which affairs of national interest and importance were discussed and such action taken thereon as the members deemed advisable. The club arranged for and scheduled a public meeting in the city of La Crescenta for the evening of November 14, 1947, at which a named speaker was to discuss the foreign policy of the United States, including the Marshall plan. The discussion was to be participated in by the members of the club and others attending the meeting. It was also understood, that at said meeting a resolution would be presented opposing the Marshall plan with the understanding that such a resolution, if passed, would be forwarded to the President of the United States, the State Department and members of Congress. Said resolution was intended to be a petition for redress of grievances with respect to the Marshall plan. At previous meet-

ings similar resolutions had been adopted and forwarded to officials of the Government.

Appellees, having knowledge that a meeting of the club was to be held November 14, and also being informed of the program and purposes of said meeting, entered into a conspiracy to breakup said meeting and to prevent the adoption and transmission of the proposed resolution. In furtherance of such conspiracy appellees went to the building in which the meeting was being held, threatened to and did assault appellants, ordered those attending the meeting to leave and thus forced those in attendance to disperse and by threats and violence prevented those attending the meeting from adopting and transmitting the proposed resolution. Appellees had not conspired or interfered with public meetings held with the knowledge of appellees by organizations expressing views with which appellees agreed and at which resolutions were adopted respecting the foreign policies of the United States. The trial court held that § 47(3) of Title 8 U.S.C.A. does not sanction a cause of action against private individuals who interfere with the privilege of assembling to petition Congress and to discuss national affairs unless the interference is committed by the state or a person acting under authority thereof.

In short, the question presented is whether § 47(3) authorizes a civil suit for damages against private individuals for interfering, pursuant to a conspiracy, with an assemblage of citizens to discuss United States foreign policy and to petition the national government for redress of grievances.

This broad question embraces three issues: 1. Did Congress intend to create such a civil action by the enactment of § 47(3)? 2. If so, did Congress have constitutional power to do so? 3. Granted the constitutional power, is the statute a proper exercise thereof? We deal with the questions in the order named.

Intended Scope of § 47(3)

The District Court concluded that the statute was intended to give a remedy for deprivation of rights only by persons acting under color of state law. We think it embraces the deprivation of federal rights by private individuals and that such is the interpretation given the statute by the Supreme Court of the United States.

Section 47(3) begins: "If two or more persons in any state or territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, etc." The disguise portion of the statute, it is obvious, is not concerned with state officials and it is equally obvious that the words "two or more persons" cannot be read to mean only persons acting under color of state law when a simple conspiracy is involved and, at the same time, read to mean private individuals where there is a disguise. It will be noted that the statute also provides: "If two or more persons * * * conspire * * * for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws." It does not seem reasonable to con-

strue "two or more persons" to mean "state officials" as applied to that kind of conspiracy. The applicability of the statute to private individuals is reinforced by a reading of the section in its original context. 17 Stat. 13. 8 U.S.C.A. § 47 was originally § 2 of the Act of April 20, 1871. Section 1 of that Act was 8 U.S.C.A. § 43, which explicitly applies to deprivations of rights under color of state law. Had Congress intended both provisions to be applicable to state action, it would not have inserted that requirement in the first section and omitted it from the second.

The United States Supreme Court has held that a statute identical in part with § 47(3) was directed "exclusively against the action of private persons, without reference to the laws of the state or their administration by her officers, * * *." United States v. Harris, 1882, 106 U. S. 629, 640. The statute there involved described in identical language the conspiracies set forth in the first two clauses of § 47(3) and made such conspiracies a crime without the requirement of acts done in furtherance of the conspiracy set forth in the last clause of § 47(3).

The legislative history of § 47(3) further warrants the conclusion that it was intended to afford relief against acts of individuals. Although the Act embodying said section was entitled "An Act to Enforce the Fourteenth Amendment," it was the theory of Congress that the Fourteenth Amendment gave the federal Government power to protect individual civil rights against individual action. See,

Congressional Globe, 42nd Cong., 1st Sess., pp.367-68, 608-08, Appendix 68-69. As Representative Shellabarger, chairman of the House committee responsible for the bill, explained it, the provision in the Fourteenth Amendment that all persons born or naturalized in the United States are citizens thereof gave Congress the power to protect directly the privileges and immunities of United States citizens. He included in these privileges and immunities protection by the Government, the enjoyment of life and liberty, the right to acquire and possess property, etc., citing the passage in Corfield v. Coryell, 1823, 6 Fed. Cases No. 3230, quoted in the Slaughterhouse Cases, 1872, 83 U. S. 36, 76. See, Congressional Globe, supra, Appendix 69. That this theory of the scope of the Fourteenth Amendment has since been held invalid does not detract from its persuasiveness in determining congressional intent.[2]

The congressional debates reveal that the Act was intended to curb the activities of private individuals and, in particular, the Ku Klux Klan. Con-

[2]A further indication that Congress believed it had broad power to protect civil rights from individual action is found in other statutes passed during this period. U. S. v. Reese, 1875, 92 U. S. 214, and James v. Bowman, 1903, 190 U. S. 127, held unconstitutional two sections of the Act of May 31, 1870, which purported to make it a crime for individuals to interfere with the voting rights of others without limitation to the right to vote for federal offices. Hodges v. United States, 1906, 203 U. S. 1, and The Civil Rights Cases, 1883, 109 U. S. 3, also held unconstitutional statutes which protected personal rights to contract, sue, enter places of public accommodation, etc., from individual interference.

siderable criticism was aimed at the bill (which then included criminal as well as civil sanctions) because, it was thought, the federal Government would thereby be required to enter the field of punishing individuals for ordinary assault, trespass, etc. The answer was that the bill would only protect the citizen in such rights as he had under the federal Constitution and laws. Among such rights was the right to express opinions "on all subjects which are not against the good order of the Government in which we live." Congressional Globe, supra, 382-83. The enactment was designed to protect others in addition to racial minorities. Congressional Globe, supra, 391, 394, Appendix 166-67, 181.

The district court, in part, based its conclusion that the statute applied to state actions upon the word "equal". The reason given by Representative Shellabarger for using the word "equal" to describe the protected rights was "to confine the authority of this law to the prevention of deprivations which shall attack the equality or rights of American citizens; that any violation of the right, the animus and effect of which is to strike down the citizen, to the end that he may not enjoy equality of rights as contrasted with his and other citizens' rights, shall be within the scope of the remedies of this section." Congressional Globe, supra, 478. Thus, the violation by an individual of a right which is enjoyed equally by other citizens is the denial of an "equal" privilege or immunity. Any such willful violation is inherently a purposeful discrimination against

the victim. There is not present the problem, which is present in cases of alleged denial of equal protection by state officials, of distinguishing between purposeful discrimination and mere erroneous application of a valid state law. See, e.g., Snowden v. Hughes, 1944, 321 U. S. 1.

We are aware of the recent cases which characterize § 47(3) as giving federal protection only against state action. Love v. Chandler, 8 Cir., 1942, 124 F. 2d 785; Viles v. Symes, 10 Cir., 1942, 129 F. 2d 828. Such a holding is contrary to a construction placed on similar language by the United States Supreme Court in the case of United States v. Harris, 106 U. S. 629.

It is apparent that Congress intended by § 47(3) to provide a federal civil action by private individuals against other individuals for the deprivation of personal rights, among which are the rights alleged in the complaint in the instant case. It is quite as apparent that the courts have substantially limited the protection intended, holding some of the expressed protection to be beyond the power of Congress to provide.

Constitutional Power of Congress to Redress the Acts Alleged in the Complaint

Dual rights exist under our federal system which the federal Government has power to protect. One set of rights, comprehended in the due process and equal protection clauses of the Fourteenth Amendment, as well as in the Fifteenth and Nineteenth

Amendments and certain portions of the original Constitution, is subject to federal protection only as against state action. Another much narrower set of rights is subject to federal protection from invasion by individuals. The existence of rights of federal citizenship, subject to federal protection, was recognized before the adoption of the Fourteenth Amendment in Crandall v. Nevada, 1867, 73 U. S. 35, wherein was recognized a federal right of free access to the seat of government. The concept of a dual system was set forth in the Slaughterhouse Cases, 1872, 83 U. S. 36, which distinguished the privileges and immunities of United States citizenship from those of state citizenship.

The delineation by the courts of the narrow area of rights which Congress has constitutional power to protect from individual invasion has developed through the application of what is now 18 U.S.C.A. § 241, originally enacted May 31, 1870. This statute has been applied to individual deprivations of the right to vote for federal offices, Ex Parte Yarborough, 1884, 110 U. S. 651; the right to enjoy the privileges granted by the homestead laws, United States v. Waddell, 1884, 112 U. S. 76; the right to protection from attack while in the custody of a federal marshal, Logan v. United States, 1892, 144 U. S. 263; and the right to inform federal officers of violations of federal law, In re Quarles and Butler, 1895, 158 U. S. 532, Motes v. United States, 1900, 178 U. S. 458. The cases also indicate by way of dictum

that the right to assemble for the purpose of discussing the policies of the federal Government and petitioning that Government for redress of grievances is within the scope of direct federal protection. In United States v. Cruikshank, 1876, 92 U. S. 542, the Supreme Court had before it an indictment under what is now § 241 charging the defendants with having deprived certain citizens of their right to assemble together peaceably with other citizens for a peaceful and lawful purpose. The court held that the indictment was insufficient because it did not charge that the attempted assembly was for a purpose connected with the national Government. But, the court went on to declare: "The right of the people peaceably to assemble for the purpose of petitioning Congress for a redress of grievances, or for anything else connected with the powers or the duties of the national government, is an attribute of national citizenship, and, as such, under the protection of, and guaranteed by, the United States. The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances. If it had been alleged in these counts that the object of the defendants was to prevent a meeting for such a purpose, the case would have been within the statute, and within the scope of the sovereignty of the United States. Such, however, is not the case. The offence, as stated in the indictment, will be made out, if it be shown that the object of the conspiracy

was to prevent a meeting for any lawful purpose whatever." 92 U. S. 542, 552-53.

This passage has been repeatedly cited by the Supreme Court as establishing the right of assembly for national purposes as a federally protected right. See, Presser v. Illinois, 1886, 116 U. S. 252, 267; Logan v. United States, 1892, 144 U. S. 263, 286; In re Quarles and Butler, 1895, 158 U. S. 532, 535; Hague v. C.I.O. 1939, 307 U. S. 496, 513, 522. In Powe v. United States, 1940, 109 F. 2d 147, the Court of Appeals for the Fifth Circuit stated that it had no doubt that Congress had power to protect directly the rights of citizens to assemble peaceably to petition the federal Government for redress. The court also said: "Because the federal government is a republican one in which the will of the people ought to prevail, and because that will ought to be expressive of an informed public opinion, the freedom of speaking and printing on subjects relating to that government, its elections, its laws, its operations and its officers is vital to it." 109 F. 2d 147, 151.

We conclude that the rights alleged to have been violated in the instant case are within that narrow area of rights which Congress has constitutional power to protect from individual invasion. We do not think that such a holding necessitates the opening up of the federal courts to a multitude of private suits for trespass, assault and similar invasion of private rights which are within the competence of the states to protect. A representative government

cannot function properly unless its officers are informed of the opinions and desires of the people whom they represent. To protect the right to assemble for the purposes alleged in this case is to keep open those vital channels of communication between government and the governed. This protection is within the power granted Congress by Article I, § 8: "To make all laws which shall be necessary and proper for carrying into execution * * * all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof."

Constitutionality of the Statute as Applied to the Complaint

In the above discussion we have held that Congress intended, in enacting § 47(3), to give an action against individuals for infringement of individual civil rights, including the right to assemble and petition the federal Government for redress of grievances, a right alleged in the complaint to have been violated. We have also held that this right is within the narrow area of rights which Congress has constitutional power to protect directly. It is finally necessary to determine whether § 47(3) is so drawn as to be a proper exercise of this constitutional power.

In United States v. Harris, 1882, 106 U. S. 629, certain defendants had been indicted for conspiring to deprive certain persons in the custody of a state sheriff of equal protection of the laws by assaulting

them, etc. The indictment was under a statute (R. S. § 5519), which described in identical language the conspiracies set forth in the first two clauses of § 47(3) and made such conspiracies a crime without the requirement of acts done in furtherance of the conspiracy, set forth in the last clause of § 47(3).

The statute was struck down because of its breadth. Sec. 5519 provided against the deprivation of "equal protection of the laws or equal privileges or immunities under the laws." This provision was broad enough to encompass both federal and state laws and as to state laws Congress was without power to legislate.

In Baldwin v. Frank, 1887, 120 U. S. 678, the Supreme Court held that the provisions of § 5519 were not severable, saying: "A single provision, which makes up the whole section embraces * * * those who conspire to deprive one of his rights under the laws of a state, and those who conspire to deprive him of his rights under the Constitution, laws or treaties of the United States."

We find within § 47(3) a provision which does not embrace rights under state law. While the language used in § 47(3) is identical with that used in § 5519 from the beginning of § 47(3) to the word "laws" in the eighth line thereof, said § 47(3) then goes on to require that there be an act in furtherance of the conspiracy "whereby another is injured in his person or property or deprived of having and exercising any right or privilege of a citizen of the United States." Of course, the provision relative to injury

to person or property is subject to the same constitutional infirmity as the Supreme Court found in § 5519. However, that portion of § 47(3) which makes actionable a deprivation of a right or privilege of a citizen of the United States relates solely to a federal right and is clearly severable.

We conclude that Congress has the constitutional power to protect against invasion of federal rights by private individuals. Congress has exercised that power by enacting § 47(3). The allegations of the complaint are sufficient to invoke the provisions of said section.

There exists an understandable reluctance to open the doors of federal courts for the redress of grievances inflicted by one set of individuals upon another lest those courts be flooded with actions that should properly be left to the states. We do not think the narrow compass of federally protected rights set up in § 47(3) will permit of such a result. If it does, and the load becomes too burdensome, it then becomes a matter with which the Congress must deal.

Judgment of dismissal reversed.

Dissenting Opinion

Healy, Circuit Judge, Dissenting

I am in general agreement with the opinion of the trial judge, 80 F. Supp. 501, although possibly I have approached the case from a different angle.

The statute involved, 8 USCA § 47, had its origin

in section 2 of the Act of April 20, 1871, 17 Stat. 13, entitled "An Act to Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for Other Purposes." In the Revised Statutes of 1873[1] section 2 of that Act so far as it provides civil remedies was extensively rearranged and became § 1980. As will later appear, the penal sanction embodied in section 2 was at that time transferred to the title denominated "Crimes." For the moment it is enough to say that 8 USCA § 47 is identical in wording, arrangement and subdividing with § 1980. Apparently the clause of subdivision (3) thereof, presently of importance, has been construed in but two cases, Love v. Chandler, 8 Cir., 124 F. 2d 785, and Viles v. Symes, 10 Cir., 129 F. 2d 828, in both of which it was regarded as giving federal protection against state action only.

Omitting all matter not material to this case, § 47(3) reads: "If two or more persons in any State or Territory conspire[2] * * *, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; * * * in any case of conspiracy set forth

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[1]Statutes at Large, Vol. 18, p. 348.

[2]The portion of the opening clause referring to the going "in disguise on the highway or on the premises of another" is immaterial here, appellants having expressly abandoned any claim of reliance on that phrase.

in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators."

The clause descriptive of the conspiracy forms the heart of this inqury and therefore merits closer scrutiny than I think my associates have given it. It is notable that the phraseology employed is formal and abstract rather than particular or concrete, whereas the contrary is the case in respect of all other conspiracies outlined in § 47. The crucial verbiage is "for the purpose of *depriving,* either directly or indirectly, any *person* or *class* of persons of the *equal protection of the laws,* or of *equal privileges and immunities under the laws.*" The similarity of the verbiage I have italicized to the wording of Section 1 of the Fourteenth Amendment shows that Congress, in choosing its language, was thinking immediately in terms of that Amendment and its vindication.[3] As my associates observe, the

[3]The language of the Amendment is that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State * * * deny to any person within its jurisdiction the equal protection of the laws."

congressional debates display a belief (later determined to be erroneous) that the Fourteenth Amendment bestowed on the national government power by legislation to protect the civil rights of persons against individual as well as state invasion; and it is but just to assume that this belief inspired the distinctive language of the clause now under examination. The insuperable difficulty one finds in the way of applying the clause to any action other than such as may be taken under color of state authority seems directly traceable to these circumstances.

We should know now, I believe, that in the constitutional sense it is not within the competence of private persons, whether acting singly or in concert, to deprive others of the equal protection of the laws or of equal privileges under the laws. Only action taken under state aegis is capable of effectuating that. Private individuals may conspire to impede, hinder, interfere with, or interrupt the free exercise of a constitutionally protected right or privilege, and it is within their capacity to take effective steps in the furtherance of such a conspiracy. But individual action of this sort can be taken only by conduct violative of state law, such for example as trespass, assault, intimidation, riotous tumult or the enforced dispersal of public assemblages—all of these being wrongs which, in the absence at any rate of suitable federal legislation, the state alone is competent to punish or redress, or by the exercise of its police power to prevent.

That this is so was long ago pointed out by the Supreme Court in the Civil Rights Cases, 109 U. S.

3, 17. The Court said: "The wrongful act of an individual, unsupported by any such [state] authority, is simply a private wrong, or a crime of that individual; an invasion of the rights of the injured party, it is true, whether they affect his person, his property, or his reputation; but if not sanctioned in some way by the State, or not done under State authority, his rights remain in full force, and may presumably be vindicated by resort to the laws of the State for redress. An individual cannot deprive a man of his right to vote, to hold property, to buy and sell, to sue in the courts, or to be a witness or a juror; he may, by force or fraud, interfere with the enjoyment of the right in a particular case; he may commit an assault against the person, or commit murder, or use ruffian violence at the polls, or slander the good name of a fellow citizen; but, unless protected in these wrongful acts by some shield of State law or State authority, he cannot destroy or injure the right; he will only render himself amenable to satisfaction or punishment; and amenable therefor to the laws of the State where the wrongful acts are committed. Hence, in all those cases where the Constitution seeks to protect the rights of the citizen against discriminative and unjust laws of the State by prohibiting such laws, it is not individual offences, but abrogation and denial of rights, which it denounces, and for which it clothes the Congress with power to provide a remedy. This abrogation and denial of rights, for which the States alone were or could be

responsible, was the great seminal and fundamental wrong which was intended to be remedied."

It will be helpful at this juncture to turn to the case of United States v. Harris, 106 U. S. 629, from which, curiously enough, my associates appear to derive comfort. As I said earlier, the penal sanction of section 2 of the Act of April 20, 1871, was transferred to the "Crimes" title on adoption of the Revised Statutes. This provision afforded criminal penalties for engaging in conspiracies of the sort described in the section; and in the revision it became § 5519, shown below.[4] It was this section that was before the Court in United States v. Harris, supra, and was there held invalid as being beyond the authority of Congress. My brothers say it was struck down because of its breadth, that is, because it encompassed indiscriminately invasions of state as well as federal rights. This view is superficial and only partially correct. Apparently it is based on the

[4] "Sec. 5519. If two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; each of such persons shall be punished by a fine of not less than five hundred nor more than five thousand dollars, or by imprisonment, with or without hard labor, not less than six months nor more than six years, or by both such fine and imprisonment."

Court's passing approval of the holding in United States v. Reese, 92 U. S. 214. The objectionable sweep of the statute, as I understand the opinion, was by no means the sole or even the major ground upon which its invalidity was predicated.

For the Court to sweep away the statute because the particular offense charged in the case was beyond federal competence seems wholly out of character, like throwing the baby out with the bath. Primarily it appears to have been thought unconstitutional because "directed exclusively against the action of private persons, without reference to the laws of the State or their administration by her officers" [p. 640]. Later in the opinion [p. 643] the Court remarked that if Congress has power to punish a conspiracy of this character, it can punish the act itself whether done by one or more persons. "A private person," said the Court, "cannot make constitutions or laws, nor can he with authority construe them, nor can he administer or execute them. The only way, therefore, in which one private person can deprive another of the equal protection of the laws is by the commission of some offence against the laws which protect the rights of persons, as by theft, burglary, arson, libel, assault, or murder," all of which were thought to be offenses solely within state competent. In this passage one discerns the embryo of the philosophy much more adequately developed in the Civil Rights Cases, supra. Clearly, the Harris decision renders highly dubious even the constitutionality of the statute before us.

My brothers rely extensively on the judicial his-

tory of 18 USCA § 241 (formerly 18 USCA § 51, Rev. Statutes § 5508). Similarly in the brief of appellants, as well as in those of the several organizations appearing amici curiae, that statute is lugged in as representing the "criminal counterpart" of the statute under inquiry. The section is quoted on the margin.[5] Its validity has been upheld by the Supreme Court and its provisions several times applied to private conspiracies. The cases applying it will be reviewed shortly. For the moment I desire to call attention to the fact that the statute is not at all a counterpart of the one here invoked. In fitting language it describes a conspiracy which private individuals are perfectly capable of conceiving and effecting, namely, a conspiracy to "injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised

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[5] "§241. Conspiracy against rights of citizens.

If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or

If two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured—

They shall be fined not more than $5,000 or imprisoned not more than ten years, or both."

This statute derives from the Act of May 31, 1870, 16 Stat. 141.

the same."[6] This verbiage may conceivably be regarded as descriptive of what the appellees in this case appear actually to have done and conspired to do, but since the statute provides no civil remedy in damages it necessarily affords no ground for federal jurisdiction here.

The cases in which § 241, supra, was applied reveal the Court's deep preoccupation with the necessity of the national government's protecting itself, its institutions, officers, and services from interference through individual misconduct. The first of the group, Ex Parte Yarbrough, 110 U. S. 651, involved a charge that the defendants had conspired to intimidate a citizen of African descent in the free exercise of his right to vote for a member of Congress, and in the execution of the conspiracy had beaten and wounded him. The Court said that it is the duty of the United States to see that the citizen may exercise this right freely, and to protect him from violence while so doing, or on account of so doing. "This duty," said the Court, "does not arise solely from the interest of the party concerned, but from the necessity of the government itself, that its service shall be free from the adverse influence of force and fraud practised on its agents, and that the votes by which its members of Con-

[6]This statute should be compared with 18 USCA §242, relating to the "deprivation" of rights under color of state law or custom. The switch in congressional verbiage when dealing with state action is of obvious significance.

gress and its President are elected shall be the free votes of the electors, and the officers thus chosen the free and uncorrupted choice of those who have the right to take part in that choice." The same insistent note of concern for the integrity of the functions and processes of the national government runs through all the cases arising under that section.[7]

While the problem had better be left to be dealt with when it is presented, I may for present purposes assume that the criminal statute on which all but one of the foregoing cases proceed, namely

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[7] In In re Quarles and Butler, 158 U. S. 532, the charge was that the defendants conspired to injure and oppress one Worley for having reported to a United States deputy marshal that certain individuals had violated the internal revenue laws by carrying on illicitly the business of a distiller. In Logan v. United States, 144 U. S. 263, the conspiracy charged was to do violence to certain individuals while in the custody of a United States deputy marshal, who was holding them to answer for a federal offense. United States v. Waddell, 112 U. S. 76, involved the right of a citizen to be protected against enforced removal by others from public land on which he had made a homestead entry, where it was requisite that he continue his residence to perfect his entry. Crandall v. Nevada, 73 U. S. 35, although decided prior to the adoption of these statutes, proceeds on the same strain. It had to do with a state law exacting a tax on all persons entering or leaving the state. The statute was held invalid on the broad ground of the right and necessity of the people being left free to travel to the seat of the national government, to the seaports, and to the land offices and other agencies of the United States distributed widely throughout the country.

§ 241, supra, would reach a conspiracy having substantially the object of interfering with the exercise of the right of citizens to assemble for the purpose of discussing national affairs or of petitioning Congress for the redress of grievances.[8] There is dicta in United States v. Cruikshank, 92 U. S. 542, supporting that view, although the actual holding was that no offense under the statute was discernible in the indictment, which charged that the defendants conspired to hinder named citizens of the United States (negroes) in the free exercise and enjoyment of their "lawful right and privilege to peaceably assemble . . . for a peaceful and lawful purpose." The right of the people to assemble for any lawful purpose was thought to be an attribute of the citizens of any free government and did not derive from the federal constitution. For their protection in its enjoyment, therefore, it was said that the people must look to the states.

I return now to the case immediately before us, The majority opinion gives to the instant statute no more than cursory attention, quoting it at the outset in a footnote but thereafter ignoring its distinctive wording. The clause descriptive of the conspiracy is treated as though it said something widely different from what it does say or means something other than it says. The conspiracy alleged is referred to as one to "interfere with" or

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[8] Cf., however, Screws v. United States, 325 U. S. 91; Williams v. United States, 5 Cir., 179 F. 2d 644.

"break up" a meeting being held for the purpose of discussing and petitioning Congress in respect to the Marshall Plan; and the question presented is discussed as though the conspiracy clause were couched in language substantially identical with the clause found in 18 USCA § 241, supra. The primary effort of the majority is devoted to proving their point that Congress, although purportedly legislating in support of the Fourteenth Amendment, was aiming at private rather than state action—a proposition with which I am not at all in disagreement. But their absorption in that effort has led them, I think, to overlook the circumstance that Congress succeeded only in providing redress for conduct of which individuals are in the nature of things incapable except when acting under color of state authority. Thus by a species of unconscious judicial legislation they have rewritten the clause to make it conform to what they believe to have been the legislative intent.

In the infinite multiplicity of public meetings held in this country nowadays there are few that fail to concern themselves in one way or another with national affairs. If the loosely casual interpretation the majority have given this special statute is to prevail, the federal government through its courts will from now on be under the necessity of policing political meetings throughout the whole of the forty-eight states. There are many and various ways of interfering with and interrupting such meetings when, as has frequently happened in the

course of our history, individuals of violently opposed opinion really set their minds to it. A little clique in the gallery, for example, may be concerted jeers and catcalls, the heckling of speakers, or the making of loud and unseemly noises, disrupt partisan gatherings as effectively as can be done by direct action. And the picketing of public assemblages, now so freely practised, is a calculated and often effective means of frightening the timid into remaining away altogether.

It seems to me therefore that my brothers, although protesting the contrary, have by their undiscriminating appraisal of this long dormant act opened wide the gates to federal intervention in a field heretofore thought solely within the competence of the states. For my part, out of respect at least for our dual system, which the federal courts have traditionally been vigilant to preserve, I would postpone the intervention until such time as Congress has by clear and fitting legislation made that course unavoidable. Meantime I would not, by federal exertion of a dubious power, weaken or discourage the local sense of responsibility for the policing and protection of public assemblages.

I need not review the allegations of the pleading thought insufficient below to confer federal jurisdiction. That task has already been performed by the trial judge. In his analysis of the factual aspects of the complaint he has revealed this case to be the transparent sham it is when read against the actual wording of the statute. Here, as his discussion

shows, a sporadic incident of transient interference with the exercise of a right is by the ingenuity of counsel dressed up in grave constitutional attire and pointed to as a "deprivation" of the right.

Judges are apt to be naive men, as Justice Holmes is reported as remarking, but they are not, I hope, so ingenuous as to be oblivious of the world about them. This incident occurred in La Crescenta, a sizeable suburb of the City of Los Angeles. One hardly need say that the Los Angeles community is justly celebrated for its tolerance of all sorts and conditions of people and ideas. The hospitality of the community embraces not merely the conformist, the respectable and the truly good, but the prodonents of practically every ism under the sun. Presumably, and so far as appears from appellants' pleading, La Crescenta has a police force able and willing to protect peaceful assemblies of all comers from intrusion or violence. The club whose members are complaining of the disruption of their meeting had but to call on the police to eject this handful of intruders, and if a repetition of the intrusion were anticipated at future meetings they need only have asked the local authorities for protection from it. No substantial deprival by private action of the right of assembly and petition is possible in such an atmosphere, no matter whose lexicon is taken as the standard. Moreover the laws of the State of California provide means of redress, civil and criminal, for whatever wrongs were done in this instance. If for no more compelling reason,

the dismissal of the case was justified for lack of a substantial federal question.

The judgment should be affirmed.

[Endorsed]: Opinion and Dissenting Opinion. Filed May 29, 1950.

PAUL P. O'BRIEN,
Clerk.

United States Court of Appeals for the Ninth Circuit

No. 12120

HUGH HARDYMAN, et al.,

Appellants,

vs.

ORVILLE COLLINS, et al.,

Appellees.

Appeal from the United States District Court for the Southern District of California, Central Division.

JUDGMENT

This Cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of dismissal of the said District Court in this Cause be, and hereby is reversed.

Filed and entered May 29, 1950.

PAUL P. O'BRIEN,
Clerk.

CERTIFICATE OF CLERK, U. S. COURT OF APPEALS FOR THE NINTH CIRCUIT, TO RECORD CERTIFIED UNDER RULE 38 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES

I, Paul P. O'Brien, as Clerk of the United States Court of Appeals for the Ninth Circuit, do hereby certify the foregoing ninety (90) pages, numbered from and including 1 to and including 90, to be a full, true and correct copy of the entire record of the above-entitled case in the said Court of Appeals, made pursuant to request of counsel for the appellees, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the seal of the said the United States Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 6th day of July, 1950.

[Seal] PAUL P. O'BRIEN,
Clerk.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1950

No. 217

ORDER ALLOWING CERTIORARI—Filed October 9, 1950

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(1330)